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COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

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Dear Mr. Brown:

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On March 26, 1971, you requested that the General Accounting Office offer advice and comment on a complaint by Captain Gary M. Johnson against the Aerospace Research Laboratories (ARL), Wright-Patterson Air Force Base, Ohio. Captain Johnson's allegations relate to contracts with Systems Research Laboratories, Inc., of Dayton, Ohio, for performing research tasks for the Energetics Research Laboratory (the name was changed to the Energy Conversion Laboratory in December 1970) of ARL.

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Captain Johnson's original allegations pertained to a contract now terminated which were found by the Air Force Systems Command Inspector General in December 1970 to be essentially valid. As a result the Commander, ARL, was directed to review, correct, and improve his contractual practices and relationships. We did not reexamine these allegations. We concentrated our examination on the practices and procedures in effect under the current contract to identify any corrective actions.

Captain Johnson, in his letter to you, contended that ARL was using a contract awarded for independent research to obtain the services of technicians, draftsmen, and other skilled employees. Captain Johnson also stated that, to present the appearance of conducting independent research, the contractor routinely reported the results of research conducted by Government personnel as its own. We are unable to respond to the second statement because we found that a final report under the contract is not due until 1973 and that no interim technical reports are required.

In considering the validity of the allegations, we interviewed Captain Johnson, Air Force personnel of the Energetics Research Laboratory, Air Force procurement and legal personnel, and personnel of Systems Research Laboratories, Inc. We also examined the contract files and other related documents, including information furnished by the Air Force Systems Command Inspector General relating to his review.

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The Price Negotiation Memorandum states that the present contract (F-33615-70-6-1515) represents a continuation of the same work and effort by Systems Research Laboratories as under the prior 3-year contract. The period of performance is 36 months of research effort and 4 months more for a final report. The contract completion date is March 16, 1973.

The contract requires both research effort and support services. The "Statement of Work" states that:

*** The contractor shall provide the Government with the required scientific, engineering and technical support to further and enhance the ARE [Energetics Research Laboratory] research program. Most of the manhours to be expended will be in the technical support area, but it is most important that the contractor employ qualified scientific and engineering personnel to supervise and serve as liaison between the contractor's support personnel and Government personnel. More specific requirements for the technical support personnel are included in Section III, Other Requirements. A close liaison and spirit of cooperation will have to be maintained by contractor's personnel to effect the timely exchange of information and data, the desired and required design of research apparatus and its instrumentation, and the planning and programming of resources for most effective use thereof."

The characterization of portions of the work as independent research or support services would not appear to be critical, since the basic issue is whether the work is being performed under circumstances creating a relationship between Government personnel and contractor employees which is tantamount to that of employer and employee.

The criteria basic to any determination of whether an individual is a Federal employee are set forth in the United States Code (5 U.S.C. 2105(a)). The same criteria are used to establish whether, under a contract, the relationship which

exists between the Government and contractor employees is tantamount to that of employer and employee and thus would require that the services under consideration be obtained in accordance with Federal personnel laws. The tests determine whether the employee is

- appointed in the civil service by a Federal officer or employee,
- engaged in the performance of a Federal function under authority of law or an Executive act,
- subject to the supervision of a Federal officer or employee while engaged in the performance of the duties of his position.

In applying these criteria there is seldom any dispute as to whether the individuals are engaged in a Federal function. There may be no direct or positive appointment by a Federal officer which would formally establish an employer-employee relationship, but the presence of facts establishing the third criterion, that of detailed supervision, ordinarily will constitute evidence that such an appointment should have occurred. In our opinion, the evidence in this case tends to establish this sort of supervision.

The Civil Service Commission has listed six elements, the cumulative presence of which ordinarily will constitute the procurement of personal services proscribed by the personnel laws. They are:

1. Performance is on site.
2. Principal tools and equipment are furnished by the Government.
3. Services are applied directly to integral effort of agencies or to an organizational subpart in furtherance of assigned function or mission.

4. Comparable services, meeting comparable needs, are performed in the same or similar agencies using civil service personnel.
5. The need for the type of service provided can reasonably be expected to last beyond 1 year.
6. The inherent nature of the services or the manner in which they are provided reasonably require direct or indirect Government guidance or supervision of contract employees in order to
 - adequately protect the Government interest,
 - retain control of the function involved, or
 - retain full personal responsibility for the function supported in a duly authorized Federal officer or employee.

In our opinion, the first five elements are evidenced, to a substantial degree, in the contractual arrangements with Systems Research Laboratories and in its operation. With regard to the sixth criterion--that of the necessity for supervision--an effort has been made to correct the situation found by the Inspector General of the Air Force Systems Command. As written, however, the current contract affords a degree of latitude in the assignment of work which could easily permit Air Force personnel to directly supervise the work of contractor employees. The contract provides that:

"The contractor must provide complete management capability for the performance of the subject contract. The work requirements, specifying the work to be performed by the contractor, will be presented to the contractor in written or verbal form. Design, development, installation, checkout and operational phases shall be planned and executed under the direction of the contractor's supervision with specified ARE [Energetics Research Laboratory]

coordination and approvals strictly complied with at critical points." (Underscoring supplied)

We noted that instructions were promulgated, following the Inspector General's report, which prescribed the form and method for issuing formal task assignments. These instructions call for the responsible Government scientists to prepare and include work descriptions which are complete and definitive enough to allow the contractor to carry out the work without Government supervision. In particular the assignments are to spell out, as required, details of the work to be performed; to prescribe the procedures to be used; and to set forth any special data requirements. These procedures represent an attempt on the part of the Government personnel concerned to comply with their understanding of the requirements for administering a contract on a proper task-order basis.

Our review, however, indicated that the procedures failed to satisfy their intended purpose of maintaining a contractual arm's length between the parties. The task assignments do not appear to give a sufficiently adequate description of the work to be performed to permit the contractor or its employees to proceed without further direction or guidance. Some task assignments contemplate additional, yet undefined, follow-on work. One task assignment designates a particular Government employee for coordination, while others, by their terms, refer to further designation or specification of details.

The contract work statement recognizes that, in the research environment, a responsive cooperation is required which cannot be prescribed in terms of a task assignment. It is introduced as follows:

"The inherent uncertainty of research work and programs precludes setting forth a detailed description of the work to be performed. However, the paragraphs below prescribe in some detail the research programs with which the contractor must

interact. Many changes are expected to take place in regard to the specifics of the research but the nature of the contractor's efforts and the close liaison that will be maintained will preclude these variations from being a problem to either the contractor or the Government. ***"

Thus, although we found no direct evidence of actual Government supervision or control of contractor employees, we believe that such supervision is implicit in the complex character of the work and in the broad fashion in which it is directed in the task assignments reviewed. The degree to which Government and contractor personnel apparently are physically intermingled in the laboratory, the close relationship that exists between projects and must necessarily exist among the personnel performing them, together with the fact that the contractor and many of his employees have been working in the laboratory for nearly 6 years, all contribute to the appearance that the contractual personnel are simply an augmentation of the Government laboratory staff.

The presence of all six aforementioned Civil Service Commission elements in such substantial degree may be viewed, in effect, as establishing a rebuttable presumption that supervision exists. The issuance of task orders to a contractor may ordinarily serve to overcome this presumption, but, by their vagueness, the task orders in this instance appear only to contribute to the conclusion that the services acquired are still being performed under an arrangement that may well be proscribed by the personnel laws.

In view of the indications of a possible violation of civil service laws and regulations, we are furnishing a copy of this letter to the Civil Service Commission for such further investigation, views, and action as it deems necessary.

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We are also furnishing copies to Systems Research Laboratories, Inc., the Secretary of Defense, and the Secretary of the Air Force.

Sincerely yours,



Deputy Comptroller General
of the United States

The Honorable Clarence J. Brown
House of Representatives